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IN THE

Supreme Court of the United States

October Term, 1967

No. 72

UNITED STATES OF AMERICA,

vs.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

Defendants-Petitioners.

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco., Inc.,

Non-Party Respondent.

NON-PARTY RESPONDENT'S BRIEF IN OPPOSITION

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The Questions Presented

This petition presents serious questions relating to the administration of justice in federal courts. The neat, scholastic, rhetorical question presented by the petitioners offer no assistance towards the solution of these complex problems. It is conceded by both sides that there must be a judicial balancing of the equities between the parties; that the solution of the problems presented by this petition lies in the proper exercise of judicial discretion and procedural flexibility.

The important questions presented as we view them are:

(1) Does due process require that petitioners under indictment in the United States District Court for the Southern District of New York have the option of non-appearance in the Trustee's independent civil litigation pending in the United States District Court for the Eastern District of New York where they refuse to assert their privilege against self-incrimination and refuse to make any meaningful application for relief under 30(b) of the Federal Rules of Civil Procedure.

(2) Does either due process or "considerations of fairness" require that a federal district judge sitting in the motion part of the court controlling the criminal case assume to himself the power to control all other related civil actions pending in either state or federal forums.

(3) As between two federal courts, one controlling the civil litigation, the other the criminal litigation, which is in the best position to exercise the procedural flexibility and the judicial discretion necessary to strike the proper balance.

Constitutional Provisions, Statutes and Rules Involved

In addition to those enumerated by petitioners on page 2 of their brief, Rules 1, 26 and 30(b) of the Federal Rules of Civil Procedure are also involved.

Statement of the Case

The operative history leading up to this petition revolves about two separate proceedings: (1) the Trustee's civil case (Wharton v. Lybrand, et al., 65 Civ. 664) instituted in the United States District Court for the Eastern District of New York in July 1965, and (2) a subsequent

criminal case instituted approximately one and-a-half years later in the United States District Court for the Southern District of New York in October 1966. The Trustee, of course, is not a party to the criminal action. It is conceded that the Trustee has been pursuing an independent course of action and that there has been no collusion between the Trustee and the Government.

A. Public Events Leading up to the Trustee's Complaint

Continental Vending Machine Corp. ("Continental") was, until April 8, 1963, engaged in the manufacture, operation, sales and service of coin-activated vending machines.

Harold Roth ("Roth") was President, Chairman of the Board and principal stockholder of Continental from 1956 to March 1963. At that time he resigned as President and Chairman of the Board. He controlled and dominated Continental from 1956 when he acquired a controlling interest through merger. He also controlled and dominated Valley Commercial Corp. ("Valley"), a small, privately-owned corporation, ostensibly in the finance business (69-77, R 277).

Lybrand, Ross Bros. & Montgomery ("Lybrand") is a firm of certified public accountants which holds itself out to the public as being "independent" public auditors. Lybrand was retained by Roth in 1956 in connection with Roth's takeover of Continental by the merger of certain of his privately-owned companies into Continental and remained as the "independent" auditors of Continental from 1956 to approximately May 1963.

Petitioners Simon and Kaiser are partners in the Lybrand firm; petitioner Fishman is a senior employee of Lybrand. These three men were the central figures

in conducting Lybrand's "independent" audit examinations of Continental's financial statements (11, 86, R 277).

Continental is a publicly-owned corporation with over 5,000 security holders. There are two classes of securities outstanding, 4,080,701 shares of common stock, and as a result of a public offering in December of 1961, $4,719,700 principal amount of 6% convertible subordinated debentures. These securities were registered and until February 27, 1963, were traded on the American Stock Exchange, a national securities exchange (69, R 277).

Continental's financial statements related to the fiscal period ending September 30th. By certification, dated February 15, 1963, Lybrand certified to Continental's financial statements for the fiscal year ending September 30, 1962. Among other assets, the statements showed a receivable due from Valley Commercial Corporation in the approximate amount of $3.5 million. It was presented as though the receivable was fully secured and realizable in full. In fact, the receivable was worthless (R 279, R 317-320, 74-75).

During the month of February 1963 the American Stock Exchange made certain inquiries relating to Continental's condition. On February 27, 1963, as a result of these investigations, the American Stock Exchange suspended trading in Continental's securities.

On April 8, 1963, by order of the United States District Court for the Southern District of New York, based upon a complaint filed by the Securities & Exchange Commission ("SEC"), a conservator was appointed to take possession of, and operate Continental's business. The SEC charged that Harold Roth and others were despoliating Continental's assets. The SEC reported that Roth was using Valley as a conduit to syphon off millions of dollars

of Continental's money for his own use and benefit and by January 31, 1963, more than $4 million of Continental's badly needed cash had been funnelled to Roth through Valley; Valley was unable to pay Continental because Roth was unable to pay Valley. The Valley receivable as shown on Continental's financial statement was worthless. Less than two months after Lybrand had given a clean certificate to Continental's financial statement, the SEC's complaint averred:

> "Under the stewardship of the individual defendants, less than a year and a half after raising more than $5 million from the public, defendants are unable to account to the Commission, the American Stock Exchange or the investing public as to Continental's true financial picture and the disposition by Continental of the funds it received. As officers and directors, under the aegis of Roth, they have stood idly by and watched millions of dollars of securities holders' moneys flow through Valley to Roth and family for reasons for which they are unable to account. They have permitted hundreds of thousands of dollars of the amount received by Valley to be advanced in many cases without interest or security, to themselves. The books and records of Continental and Valley are so incomplete and inadequate that no proper Form 10-K can be filed until an independent audit has been made under the supervision of a receiver acting under the direction of this Court. Defendants have in their possession, custody and control money and property of Continental and Valley which they may transfer, sell, assign, pledge or otherwise waste or dissipate to the immediate and irreparable loss and damage of Continental's public security holders, unless the Court appoints a receiver of the assets of Continental and Valley." (69-78).

The Conservator was unable to prevent insolvency. An involuntary petition praying that Continental be reorgan-

ized pursuant to Chapter X of the Bankruptcy Act was filed in the Eastern District of New York and by order dated July 12, 1963, the Hon. Jacob Mishler, the United States District Court Judge for the Eastern District of New York, granted the involuntary petition and appointed the Conservator, under Judge Bonsal's order, and Irving L. Wharton as Co-trustees of Continental. Irving L. Wharton, a citizen and resident of the State of New York, is now the sole duly qualified and acting Trustee of Continental (10, 69-78).

B. The Trustee's Civil Suit

By September 1964, more than two years before the criminal indictment, the Trustee had decided to bring suit against Lybrand. The complaint was not filed at that time since, at Lybrand's request, the Trustee and Lybrand undertook negotiations to explore the possibility of settling the Trustee's claims without suit. The negotiations failed, and on July 1, 1965, the Trustee filed a civil action (65 Civ. 664) naming as defendants Lybrand, a financial institution and Harold Roth. The action against the financial institution has been withdrawn due to settlement. Harold Roth has taken the fifth amendment and Lybrand remains the only defendant subject to discovery. The petitioners are the central actors in the Lybrand engagement and are the only persons who can supply information relating to the vital areas of the Continental audit (99, 100, 182).

The Trustee's complaint alleges in essence: 1) breach of contract and warranty for each of the audit years 1958 through 1962; 2) negligence and reckless behavior on the part of Lybrand in regard to each of the audit years 1958 through 1963; and 3) conspiracy to despoil the assets of Continental and to conceal these acts through various

means, including the certification and issuance of false financial statements by Lybrand.

Immediately after the filing of the complaint, the Trustee began extensive discovery proceedings against Lybrand. By mutual agreement of counsel, it was arranged that all Lybrand worksheet papers and documents relating to the audit years in question were placed in the tax conference room at Lybrand and made available to the Trustee's attorneys and accountants. By September 1965 the Trustee began conducting depositions upon oral examinations of various members of the Lybrand firm, including the deposition of petitioner Simon. By the week of October 11, 1966, the Trustee was finishing his examination of one McDevitt, a Lybrand employee, and by mutual agreement the deposition of Kaiser was scheduled for October 21, 1966. Kaiser's appearance had been scheduled for an earlier date, but due to the pressures of Lybrand business, the Trustee's counsel agreed to a postponement (99-107).

C. The Criminal Indictment

On October 17, 1966, 15 months after the filing of the Trustee's complaint, an indictment was returned in the Southern District of New York naming Roth and petitioners Simon, Kaiser and Fishman. Among the co-conspirators named but not indicted was the Lybrand firm and McDevitt.

There are, admittedly, points of approach and contact between the issues raised by the Southern District indictment and the Trustee's civil case. Of course, in that the indictment is not concerned with events prior to 1961 and is not concerned with questions of breach of contract, breach of warranty and of negligence, it differs substantially from the complaint. There are significant areas

open for examination which have absolutely no relation to the issues raised in the criminal case.

D. Petitioners' Voluntary Disclosures to the Government

During the course of the criminal investigation, petitioners Kaiser, Simon and Fishman were represented by competent counsel. Petitioners and the Lybrand firm adopted the position that they were going to make full disclosure to the Government and to the SEC in order to stave off the threatened indictment. Accordingly, all of the Lybrand worksheet papers, including those prepared by the petitioners, were made available to the Government and the Government's accountants. More important, Kaiser, Simon and Fishman appeared before the Federal Grand Jury and testified, not once, but several times, as did other representatives of the Lybrand firm.

Petitioners, as well as Lybrand, asked permission to present accounting experts to testify before the Grand Jury; this permission was granted and outside accounting experts testified in petitioners' behalf. Counsel for petitioners joined separate counsel for the Lybrand firm in submitting to the United States Attorney's Office a detailed written memorandum which contained petitioners' factual contentions and theories in their defense in regard to the criminal charges. Thus, petitioners, as well as the Lybrand firm, voluntarily gave to the Government the widest latitude of discovery (R 62-65, 102-103).

E. The Kaiser Deposition

Soon after the criminal indictment was filed, counsel for petitioners and counsel for Lybrand took the position that the depositions in the Eastern District civil action should be stayed. However, only Kaiser moved in the United States

District Court for the Eastern District of New York before Judge Mishler for a vacatur of his scheduled deposition under Rule 30(b) of the Federal Rules of Civil Procedure. His motion was based on very restrictive grounds: that his mere appearance at the depositions, in light of the criminal indictment, would be oppressive and violative of his constitutional rights. Kaiser's counsel refused to state to the Court whether or not Kaiser intended to invoke any constitutional privilege at his examination. Judge Mishler ruled that there was nothing oppressive about Kaiser's mere appearance at his scheduled examination and that assertion of constitutional rights on a motion to vacate was premature. Accordingly, Kaiser was ordered to appear for examination, but was free to assert at the examination any constitutional privilege he might think appropriate (104-105, 179).

Kaiser appealed, but that appeal was dismissed summarily on October 16, 1966, obviously because it was premature—nothing of significance had yet occurred in the Court below. The Court of Appeals remanded matters back for further proceedings in the District Court (104-105).

On October 26, 1966, Kaiser appeared at his scheduled deposition at the United States District Court for the Eastern District of New York. Kaiser waived his fifth amendment privilege and chose to testify for the remainder of that day. On October 31, 1966, Kaiser again appeared at his scheduled examination, waived his privilege under the fifth amendment and testified during that day. Further deposition dates were fixed for November 2 and November 4, 1966. Never once did Kaiser assert his fifth amendment privilege to avoid the lawful process of the Eastern District Court either under the due process or self-incrimination clauses (R 4-17).

On October 27, 1966, petitioners added to the already impressive array of legal talent representing them. They switched forums and moved in the criminal motion part in the Southern District of New York for an order enjoining the civil case against Lybrand until the completion of the criminal case, on the grounds that the continued depositions would provide evidence to the Government, otherwise unavailable to it, and that the depositions would be burdensome (104).

F. Conflicting Orders Between Eastern and Southern Districts of New York

On November 1, 1966, Judge Bryan heard oral argument on the application and papers were submitted to him. He held no hearings. Approximately 37 days passed and nothing was heard from Judge Bryan. During that time Judge Mishler became concerned with what he considered to be an interference with the legitimate jurisdictional exercise of the Eastern District. He was concerned that the delay was affecting the moving of the civil case for trial; the prompt determination of the rights of creditors; and was unduly interfering with the plan of reorganization and the winding up of Continental's affairs, now more than three and-a-half years old. Accordingly, he issued an order on December 5, 1966 in furtherance of his original order of October 24, 1966 directing that the examination of Kaiser go forward despite the temporary stay, now more than 20 days old, issued from the Southern District of New York, which assumed to the Southern District the power to stay the Eastern District process. Both sides found themselves on the horns of a dilemma with the Eastern District ordering them to proceed and the Southern District ordering a stay. Kaiser then moved before the Court of Appeals for a temporary stay of Judge Mishler's

direction of December 5, 1966. The Court of Appeals granted a temporary stay in order to give Judge Byran a chance to render his decision. Several days later, Judge Bryan issued the instant opinion which enjoined the Trustee from examining Kaiser, Fishman and Simon.

G. Judge Byran's Injunction Order and Court of Appeals Reversal Thereof

Judge Bryan's opinion holds that "civilized standards of procedure and evidence" require that a person under indictment be given the option of non-appearance in any related civil case outstanding in any federal or state court. Moreover, this option need not be asserted in the forum that controls the civil litigation. Judge Bryan assumed to himself "sitting in the criminal motion part" a supervisory power over the process of every other federal or state court. Accordingly, he stayed the legitimate process of the Eastern District of New York without requiring petitioners to make a meaningful application before that Court. He originated his vast display of power despite the fact that petitioners had adequate remedies under either the fifth amendment or a motion under 30(b) of the Federal Rules of Civil Procedure. Judge Bryan's opinion is not justified by precedent or by necessity.

Every case relied on by Judge Bryan, indeed every reported case on this subject, are cases that were brought under Rule 30(b) of the Federal Rules of Civil Procedure before the district court or judge controlling the civil case. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its proceedings under Rule 30(b) of the Federal Rules of Civil Procedure if the movant can show that the

civil case is being used as a "dodge" to subvert the criminal case or to avoid the protections of the fifth amendment. And absent the ability to make such a showing, a witness in a civil proceedings can avoid testifying in those proceedings only by invoking his rights under the self-incrimination clause of the fifth amendment.

The Court of Appeals reversed Judge Bryan because it was conceded that the Trustee's civil case was an independent proceeding brought long before the criminal case and in furtherance of the legitimate interests of literally thousands of security holders and creditors; that "the Trustee requires" the petitioners' "deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed"; it is conceded that the Trustee seeks in "good faith" to depose the appellees for that purpose alone, and there has been no consultation between the Trustee and the Government in regards to the conduct of the Trustee's civil case. The Court of Appeals assumed that Judge Bryan had the power to act, but reversed Judge Bryan because they recognized that there is nothing about the Trustee's civil case that is "unfair" or threatens the integrity of the criminal case.

The Court of Appeals was also led to reverse Judge Bryan's order by the:

> "... consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to

depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (184-185).

Summary of Argument

It is conceded that the Trustee's civil lawsuit is independent and unconnected with the criminal case; that it is affected with a public interest and is not in any way a ruse designed to subvert the petitioners' rights in the criminal case pending in the Southern District of New York. Petitioners' testimony in the Trustee's civil case is completely voluntary and results from a wilfull refusal on their part to avail themselves of their rights under the fifth amendment and under F.R. Civ. P. 30(b). The full measure of a witness' ability to avoid testimony in a civil case is to invoke the fifth amendment or to make a motion addressed to the discretion of the court in control of the civil process. The orderly administration of federal justice requires this. A judge sitting in the motion part of a court controlling a criminal prosecution has no right to issue what is tantamount to a writ of prohibition over a court of co-equal power which has complete jurisdiction of the civil case.

POINT I

The Trustee's pretrial examination is bona fide and proper. Petitioners can avoid testifying in the civil action only by moving that Court's discretion under F.R. Civ. P. 30(b) or by assertion of their fifth amendment privilege.

Rule 26(b) of the Federal Rules of Civil Procedure provides in part:

> "Unless otherwise ordered by the Court . . . the deponent may be examined regarding any matter *not privileged* which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the examining party, . . ." [Emphasis added].

Rule 30(b) of the Federal Rules of Civil Procedure provides in part:

> "Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court *in which the action is pending* may make an order that the deposition shall not be taken, . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." [Emphasis added].

These Rules, together with Rule 1 of the Federal Rules of Civil Procedure, express a strong policy in the law, that a civil litigant may examine his adversary in advance of trial, on relevant, unprivileged matters, absent a showing that the examination is being conducted in bad faith and in such a manner as unreasonably to annoy, embarrass

or oppress the person being examined. *Russo* v. *Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957). The Trustee's discovery proceedings in this civil case, brought over two years before the Southern District indictment, and without any reference to it, are being conducted in good faith, and not to annoy, embarrass or oppress any of the persons being examined.

Hiss v. *Chambers*, 8 F.R.D. 480 (N.D. Ohio, 1948), is the only case precisely in point. There, as here, a civil action was commenced long before the criminal case and without reference to it in the Northern District of Ohio. There, as here, a subsequent criminal indictment was returned in the Southern District of New York. The Government sought to stay the civil action and particularly the examination of Chambers, the Government's chief witness in the criminal trial. The Government did not move in the Southern District of New York where the criminal action was pending under a vague concept of inherent equity power, but moved the District Court in Ohio to stay the civil proceedings under Rule 30(b) of the Federal Rules of Civil Procedure on the ground that the criminal action was pending in the Southern District of New York. The Ohio District Court, exercising its discretion under Rule 30(b), denied the motion, saying (at pages 481, 482):

> "More specifically, the grounds for the objection were (a) that the Federal Rules of Criminal Procedure, 18 U.S.C.A., which would be applicable to the trial of the criminal case make no provision for pre-trial examination of a prospective witness in the case and (b) that the continuation of the pre-trial deposition of Chambers (who is expected to be an important witness for the United States in the criminal case) in this civil case would in effect afford the defendant in the criminal case a possible advantage otherwise unavailable except for the pendency of the civil case, and to be used as

a possible basis for cross-examination of Chambers as a witness in the criminal case.

* * * * * *

"I have carefully considered these objections, but do not find that they constitute from the standpoint of public interest a sufficient reason for denying the plaintiff in the civil case instituted long before the criminal case, exercise of the procedural right afforded by Rule 26 of the Federal Rules of Civil Procedure; . . ."

Judge Bryan's opinion is bottomed on three concepts: (1) that Trustee's proper discovery proceedings under Rule 26(b) of the Federal Rules of Civil Procedures are, *per se*, unfair; (2) that the defendants can avoid testifying in that proceeding even where they "eschew" their fifth amendment privilege; and (3) that the criminal court has the inherent power to stay the discovery proceedings in the civil case.

To support the proposition that legitimate discovery proceedings, untainted by wrongful conduct, are unfair *per se*, he relies on the following cases:

Campbell v. *Eastland*, 307 F. 2d 478 (5 Cir. 1962), cert. den., 371 U.S. 955 (1963);
United States v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964);
United States v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964);
United States v. *Maine Lobstermen's Association*, 22 F.R.D. 199 (D. Maine 1958);
United States v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955);
United States v. *Bridges*, 86 F. Supp. 931 (N.D. Calif. 1949);
United States v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947);
Zara Contracting Co. v. *New York*, 256 N.Y.S. 2d 98 (3d Dept. 1965);

United States v. *One 1964 Cadillac Coupe*, 65 Ad. 762 (S.D.N.Y. 1966);
United States v. *One 1963 Chevrolet Sedan*, Misc. No. 63-M-1239 (E.D.N.Y. 1963);
Perry v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964);
Paul Harrigan & Sons, Inc. v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953);
National Discount Corp. v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952)."

To support his theory that the defendants can avoid testifying on other than fifth amendment grounds, he relies principally on *Paul Harrigan & Sons, supra, Perry* v. *McGuire, supra*, and *National Discount Corp.* v. *Holzbaugh, supra.*

These cases do not support either one of Judge Bryan's propositions. All of the cases cited under *Campbell* v. *Eastland, supra,* are cases brought under Fed. R. Civ. P. 30(b) before the district court in which the civil cases were pending. They all stand for the proposition that the district court controlling the civil case has a discretionary power to stay its own process under Rule 30(b) of the Federal Rules of Civil Procedure where the movant can show that the civil case is being used as a "dodge" to subvert the criminal case, or to avoid the protections of the fifth amendment. *Campbell* v. *Eastland, supra.* In not a single case was the civil action stayed by the district court in which the criminal case was pending. These cases therefore do not support the proposition that the civil case should be stayed where there is no showing that it is being used as a "dodge" to subvert the criminal case or to avoid the protections of the fifth amendment. And they certainly offer no support for the proposition that the criminal court can stay the civil court.

A careful reading of *Perry* v. *McGuire, supra, Paul Harrigan & Sons, Inc., supra, National Discount Corp.* v.

Holzbaugh, supra, shows that the application was made before the judge or court controlling the civil case and that the court exercised its discretion under F.R. Civ. P. 30(b) on the basis of fifth amendment considerations.

> "... it seems clear that to require defendant Blumner to respond to over 100 interrogatories at this time would be oppressive *and would infringe on his constitutional rights.* See Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed. 2d 502 (1963); United States v. Maine Lobstermen's, Ass'n, 22 F.R.D. 199 (D. Me. 1958); United States v. Linen Supply Institute, 18 F.R.D. 452 (S.D. N.Y. 1955); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); United States v. Bridges, 86 F.Supp. 931 (N.D. Calif. 1949); Annot., 70 A.L.R.2d 685 (1960)." *Perry* v. *McGuire, supra* at 273 [Emphasis added].

In the *Harrigan* case, *supra,* the motion under F.R. Civ. P. 30(b) was granted on grounds of the fifth amendment privilege.

> "Several individual defendants, while filing what are entitled 'Answers to Interrogatories', have, in effect, given no information but *by their answers have invoked the protection of the Fifth Amendment.* (p. 334).
>
> "... I am of the opinion that the information sought to be elicited by the plaintiff in these interrogatories may well provide proof to the Government from which it may establish the criminal charges against the indicted defendants. To compel discovery under such circumstances would contravene rights guaranteed by the Fifth Amendment to the individual defendants. The objections to the interrogatories are, therefore, well founded and will be sustained. The answers to the interrogatories *invoking the protection of the Fifth Amendment* are adequate and proper for the same reason." (p. 335) [Emphasis added].

Similarly, *National Discount Corp., supra* at 237, turned on the fifth amendment. There, Althouse, the defendant in the civil action, was being deposed. Word came to the attention of counsel that an indictment had been handed down against Althouse arising out of substantially the same facts as involved in the civil suit.

> "... whereupon counsel for Althouse objected to continuing the said deposition upon the ground that to continue answering questions relating to the subject matter of the issue framed by the pleadings of the within cause *might tend to incriminate the said Robert Althouse as a defendant named in the indictment, ...*" [Emphasis added].

Absent the ability to move under F.R. Civ. P. 30(b) in the civil case, the defendants can avoid giving testimony in the civil case *only* by asserting their rights under the fifth amendment. The entire controversy here is of fifth amendment dimensions.

In attempting to avoid the fifth amendment problem, Judge Bryan makes much of a mutuality of discovery doctrine and points out that the civil and criminal rules are different in scope and purpose. Proper analysis shows that this argument is still a fifth amendment question. What is the evil to be prevented here? The defendants fear that their voluntarily given depositions in the civil case can be used by the Government against them on the criminal trial. No matter how artfully articulated, this assertion remains a fifth amendment proposition and the only way the defendants can avoid it is by asserting their rights under that amendment.

It is true that the Government is restricted in its discovery activity against the defendants under the Federal Rules of Criminal Procedure. But those Rules are directed

against governmental activity and they are not meant to limit or prejudice the Trustee. Compare *McNabb* v. *United States,* 318 U.S. 332, 340 (1943) with *U. S.* v. *Masterson,* 251 F. Supp. 937 (S.D.N.Y. 1966). Moreover, the Federal Rules of Criminal Procedure do not restrict discovery by the Government on the basis of vague concepts of unfairness or "sportive" theories of litigation; they restrict governmental discovery in light of the fifth amendment. The Trustee, too, is limited by the fifth amendment in obtaining discovery in the civil case. Where the privilege is properly asserted, the broad discovery of the civil rules gives way to the privilege. F.R. Civ. Proc. 26. The indicted person has only one right to remain mute and that is his fifth amendment right. He does not enjoy, as Judge Bryan holds, two rights, one stemming from the fifth amendment and another from vague concepts of "fairness" or from "mutuality" between the civil and criminal rules of discovery.

Indeed, the recent revision of Rule 16 of the Federal Rules of Criminal Procedure, which expanded the Government's right to obtain discovery from a defendant, provoked Mr. Justice Douglas to comment as to its validity in light of the fifth amendment:

> "The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. . . . I mean to imply no views on the point, except to note that a serious constitutional question lurks here." *Mr. Justice Douglas' Statement,* 39 F.R.D. 277 (1966).

This is not based upon mutuality, *i.e.,* measured by the defendant's ability to discover the Government's case.

> "The prosecution's opportunity to discover evidence in the possession of the defense . . . is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation . . . [of the fifth amendment] . . . if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e.g. *Sherbert* v. *Verner*, 374 U.S. 398. . . . To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. . . ."
>
> "The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. . . ." (id at *277, 278*).

Thus, it is obvious that the Federal Rules of Criminal Procedure regulating the Government's ability to discover evidence have been fashioned from the restrictions imposed by the fifth amendment and not, as Judge Bryan suggests, from so-called concepts of unfairness. If governmental discovery in criminal cases is called unfair it is because it abrogates or denies a defendant's rights under that amendment. A person accused of crime has but one basic right to stand mute and that is the one afforded him under the Fifth Amendment to the Constitution. Accordingly, if the appellees wish to stand mute in the civil case, absent a successful motion in the civil case under F.R. Civ. P. 30(b), they can do so only by invoking the fifth amendment and not by invoking vague concepts of unfairness before a tribunal that has no power over the process in the civil case.

Indeed, if considerations of "fairness" are evaluated, they compel the conclusion that, absent assertion of the fifth amendment privilege and absent the ability to move the Civil Court to stay or limit its own process, the civil case should be allowed to go forward. Unlike any other case cited, the plaintiff is a fiduciary officer charged with a court appointed trust and that trust itself is affected with a public interest. The rights of thousands of innocent creditors and stockholders are at stake; the prompt conclusion of the bankruptcy proceeding is a matter of legitimate public interest. Judge Bryan found that the Trustee's discovery activities were not collusive nor were in any sense a ruse to achieve an illicit purpose, nor a circumvention of rights protected by the fifth amendment. The Trustee's activities are, and always have been, conducted for the Trustee's proper purposes in lawful pursuit of the objectives of his civil case.

Moreover, Simon, Kaiser and Fishman have appeared on several occasions before the Grand Jury that indicted them and responded to questions without invoking the fifth amendment. They sought and received the opportunity to present accounting experts before the Grand Jury and submitted to the Government lengthy opinions in support of their position. From the start of the criminal investigation, the individual defendants and the Lybrand firm adopted a policy of disclosure to the Government. It is ironical, therefore, that the only person who so far has been prevented from discovering the facts in this case is the Trustee.

Judge Bryan seeks to excuse petitioners from the requirement of asserting their privilege against self-incrimination by suggesting that such assertion would end the professional careers of petitioners. This claim by petitioners is seductive; it is not supported by a scintilla of

evidence in the record below. Petitioners have been unable to cite any rule, law, canon of professional ethic or State licensing requirement which indicates that a certified public accountant must lose his professional standing upon assertion of the privilege. We can find none; and if there were one, this Court's recent opinion in *Spevack* v. *Klein*, 87 S.Ct. 625 (1967), would render it inoperative. Moreover, petitioners are career men in the Lybrand organization. Lybrand has publicly announced in the press that the firm "vigorously supports" petitioners in their defense of the criminal case. Lybrand has provided them with counsel; Lybrand obviously approved of petitioners' original application before Judge Bryan which sought to seal the lips of all Lybrand personnel; and it is equally obvious that Lybrand supports petitioners' present application. The idea that Lybrand would continue its support if petitioners seek to remain mute on a claim based on the due process clause of the fifth amendment, but would abandon them in punishment if they were to remain mute on a claim based on the self-incrimination clause of the fifth amendment, is stretching credulity to the breaking point.

POINT II

The orderly administration of federal justice requires that under the circumstances here present, applications to stay or modify civil process should be made before a judge or court controlling the civil case.

The facts in the instant application adequately testify to the confusion and embarrassment caused by petitioners' unwillingness to avail themselves of the plain and adequate remedies existing in the civil case. We were subject to the spectacle of injunction and counter-injunction between federal courts of equal jurisdiction. Chief Judge Lombard, speaking for the majority of the court of appeals quite correctly resolved the serious administrative problem:

> "We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here." (184-185).

As we have already pointed out, every reported decision related to the point at issue teaches that applications for a stay of a civil suit until the disposition of a criminal prosecution on related matters ought to be made before

the judge or court controlling the civil process. Judge Bryan's actions stand alone and, as the court of appeals pointed out:

> ". . . No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, ..."

Nor do considerations of logic supply the authority which precedents fail to do. Both Judge Mishler and Judge Bryan are federal judges. Both are equally committed to preserve the rights of defendants accused of crime. No especial hierarchy exists as a result of the fact that a federal judge happens to be sitting in the motion part of a court controlling a criminal prosecution.

On the other hand, both precedents and logic demand that applications such as the petitioners make here ought to be made before the judge or court controlling the civil process. We agree with petitioners that *Campbell* v. *Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), together with every other reported case on the subject sets forth the working guidelines to be used by federal courts in the solution of the complex problems which are raised when there are points of approach and contact between criminal and civil litigation.

The *Campbell* case rested on facts significantly different from the instant application. In that case, prospective defendants in a criminal tax prosecution commenced a civil action for a tax refund. The facts underlying the claim for refund were known to the plaintiffs. The Court found that the civil suit was commenced as a "dodge" in order to enable the plaintiffs to discover from the government statements and reports protected under Title 18 U.S.C. § 3500, and "to be honest about it, the motion for discovery

(if not the suit for refund) was for the purpose of obtaining otherwise unobtainable reports." 307 F.2d 478, 490. The entire proceedings were brought before the judge in charge of the civil case. He granted discovery of the § 3500 reports. It was in that context that the Fifth Circuit set down the governing principles approved of by petitioners and set forth, in part, on pages 15 and 16 of their brief:

> "In handling motions for a stay of civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive . . . Separate policies and objectives support these different rules.
>
> ". . . 18 U.S.C.A. § 3500 does away with any pretrial discovery of statements of a government witness. A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to stay the civil proceeding. United States v. Bridges, N.D. Calif., 1949, 86 F.Supp. 931. In others it may be preferable for the civil suit to proceed—unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery. Here, however, the trial judge seemed to think that he had no discretion—once discovery was moved for in a civil suit." 307 F2d 478, 487.

It is significant that the Fifth Circuit placed the burden of "judicial discretion and procedural flexibility" in the hands of the judge in control of the civil case. Even in such a patent situation as presented by the *Campbell* case, the Fifth Circuit did not suggest that judicial discretion should prohibit the plaintiff from all discovery:

> "Limited discovery and other remedies were available which would not be vulnerable to improper inspection. Thus, the plaintiffs were clearly entitled to discovery of any documents obtained from the plaintiffs' files. By interrogatories under Rule 33, the plaintiffs could learn the names and addresses of persons having knowledge of relevant facts. By depositions under Rule 26, they could ascertain relevant facts known to the agents. . . ." 307 F2d 478, 488.

If anyone failed to use "judicial discretion and procedural flexibility" in relation to the instant case, it was Judge Bryan. He cut off all discovery of petitioners by the Trustee. Only Judge Mishler, sitting as the Rule 2 Judge in control of the civil case in the Eastern District of New York, could exercise that "judicial discretion and procedural flexibility" called for by this situation. Under Rule 30(b) of the Federal Rules of Civil Procedure petitioners could have moved, and still can move, for an order impounding their depositions. This, of course, would have completely eliminated petitioners' claimed prejudice. Petitioners' counsel admitted on oral argument before the Court of Appeals that such an order would effectively protect petitioners. Only Judge Mishler could have employed the "limited discovery" provisions called for by *Campbell* v. *Eastland, supra.* As we have pointed out, petitioners have made substantial voluntary disclosure to the Government. They are in possession of their Grand Jury testimony. It is conceded that dis-

covery by the Trustee to the same extent as the information already voluntarily given to the Government could not in any manner prejudice petitioners.

POINT III

No proper basis for the issuance of this injunction exists either in the All Writs Statute, the inherent equity jurisdiction of the District Court, or the District Court's supervisory powers over the administration of criminal justice.

Judge Bryan's actions stand alone, unsupported by precedent. The court of appeals in their reversal, did not directly tackle the question of power, because it was obvious to them that even if he had this unusual power he should not have used it under the circumstances here present:

> "Both holdings present questions of first impression. No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act, compare *Steelman* v. *All Continent Corp.*, 301 U. S. 278 (1937) (injunction restraining action against trustee in bankruptcy), or under the supervisory [fol. 586] power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials, e.g., *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *McNabb* v. *United States*, *supra*, or by enjoining the commission of acts by "federal law enforcement agencies." *Rea* v. *United States*, 350 U. S. 214, 217 (1956). We assume without deciding that the lower court had power to issue such an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense."

Judge Bryan conceives his power to enjoin the Trustee as being founded on either one or all of the following: the All Writs Statute (28 U.S. Code §1651); the inherent equity jurisdiction of the Federal Courts; or the supervisory power of the district court over the administration of criminal justice either under the rules or generally. None of these supposed sources of power forms a proper basis for the issuance of what is tantamount to a Writ of Prohibition against a sister Federal Court.

a. Inherent Equity Jurisdiction

To the extent that the District Court for the Southern District of New York possesses inherent equity jurisdiction to issue injunctions, that jurisdiction is limited by the availability to defendants of adequate alternative remedies.

Judge Bryan's opinion contains no authority to support his view that he, sitting in the criminal motion part in the Southern District of New York, had "an inherent equity jurisdiction" sufficient to justify his stay of the Eastern District's civil proceedings. The two cases cited in a footnote: *Rudnicki* v. *McCormack, et al,* 210 F. Supp. 905 (D.R.I. 1962); *Landis* v. *North American Co.,* 299 U.S. 248 (1936), not only fail to support this position but, indeed, explain the error of his position. In the *Landis* case, *supra,* multiple suits were brought in various district courts throughout the United States. A Government agency was involved. A majority of the litigants agreed that the suit should be prosecuted in a Federal Court in the Southern District of New York as a test case. Litigants who had brought suit in the District of Columbia refused to agree to this proposition. It is important to note that the government agency did not ask the Southern District of New York to enjoin the progress of the case in the

District of Columbia. Instead it asked the District of Columbia to stay its own proceedings. This it did.

The Supreme Court, in talking about that injunctive power, said:

> ". . . [T]he power to stay proceedings is incidental to the power inherent in every court to control disposition of the causes on *its* docket . . ." [Emphasis added] *Landis, supra,* p. 166

Not only does the *Landis* case fail to support the concept that Judge Bryan, sitting in the criminal motion part in the Southern District of New York, has some inherent criminal equity jurisdiction sufficient to interfere with the legitimate jurisdictional exercise of a sister court, but it reaffirms the contention that the Rule 30(b) cases stand for the proposition that the civil courts have the power to stay *their own* proceedings either by the discretion granted to them by that Rule or under "the power inherent in every court to control the disposition of the causes on its docket." It reaffirms that the defendants here had only two means with which to void the valid Eastern District process which sought their discovery—their assertion of the fifth amendment or a motion in the civil case under Rule 30(b).

Rudnicki, supra, is a most unusual case. It probably has no precedential value to support Judge Bryan. That case was concerned with a litigant who brought vexatious suits against the Judges of the United States District Court in Boston and many public officials. After dismissing multiple complaints on the grounds that they failed to state causes of actions, the District Court Judge sitting by designation then enjoined Rudnicki from reinstituting these vexatious suits against the entire bench of the Boston

Court and, incidentally, himself. The court said, at pp. 909, 910:

> "I have little question, under the circumstances disclosed, as to my power, whether under the All Writs Act, or in the exercise of my inherent equity jurisdiction, or in the exercise of my power to supervise the orderly administration of *this* court, to direct that an injunction issue.
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> • • • • •
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> ". . . Thus it has long been settled that a court of equity may enjoin the institution of repetitious and baseless litigation. The ancient bill of peace had this as one of its purposes. . . .
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> • • • • •
>
> ". . . The action which I propose to take also finds support in a line of cases in this Commonwealth which assert the power of a court, not only to protect an individual litigant from harassment, *but to protect its own records* from irrelevant, unimportant and superfluous papers." [Emphasis added].

In short, *Rudnicki* held, as *Landis* did, only that a court has power to control its own business. It further supports the Trustee's contention that any efforts to control the proceedings in the Eastern District must be made in that District. Under no stretch of the imagination can these cases support Judge Bryan's view that he can interfere with the lawful exercise of the Eastern District's jurisdiction.

b. The All Writs Statute

Injunctive relief under the All Writs Statute (28 U.S. Code § 1651) is, of course, equitable in nature, and Judge Bryan's proper utilization of that statute is limited by the existence of the adequate remedies at law discussed in POINT II of this brief. The utilization of the All Writs Statute is, however, inappropriate in this case for a second and perhaps more important reason. Historically, the All

Writs Statute has been used to prevent Federal Courts from being ousted from their jurisdiction to dispose of the *res* or subject matter before them. The very cases relied on in the opinion below demonstrate this.

In *Steelman* v. *All Continent Corporation*, 301 U.S. 278, 57 S.Ct. 705 (1937), a district court had jurisdiction of a bankruptcy matter properly before it. That court granted an injunction enjoining a corporation (a tool of the bankrupt himself) from prosecuting a suit in another district which sought to determine title to certain stocks and bonds. The stocks and bonds were the assets of the bankrupt. The injunction was issued to prevent the bankrupt from rendering nugatory any judgment that the district court before whom the bankruptcy proceedings were instituted might make regarding the title to those securities.

In *Havner* v. *Hegnes*, 269 Fed. 537 (8 Cir. 1920), the district court entertained an application to appoint a receiver for a publicly-listed corporation at the behest of a defrauded stockholder. After jurisdiction attached, a State Court appointed a receiver for the same corporation. The Federal Court enjoined the State Court receiver from disposing of the assets of the defunct concern. Obviously, if the assets of the corporation were disposed of, the court would have no meaningful *res* upon which to act; therefore the district court was protecting itself from ouster of meaningful jurisdiction and preserving its power to dispose of the assets of the insolvent corporation.

The teaching of these § 1651 cases is merely that a court, after jurisdiction of a matter legitimately attaches, may protect itself against ouster of its jurisdiction. This principle has no application here. The Eastern District proceedings in no way interfere with the Southern District's jurisdiction to hear and fully determine every issue raised by

the criminal indictment, including the Government's use, if any, of the deposition testimony.

In *Bullock* v. *United States*, 265 F.2d 683 (6 Cir.), cert. den. 360 U.S. 909 (1959), a Federal District Court issued an injunction to prevent continued violations of that court's prior order of school integration. Thus, the injunction was born of the inherent power of the Federal District Court to prevent the frustration of the execution of its valid and subsisting orders. Patently, this is not the case here. The prosecution of the civil case in the Eastern District in no way conflicts with any outstanding order of the District Court for the Southern District of New York.

Judge Bryan's conclusion that the All Writs Statute empowers a judge sitting in the Southern District in the criminal motion part to enjoin the legitimate exercise of a sister Federal Court's exclusive jurisdiction is unsupported by any of the cases that he cites. Moreover, none of the cases he cites deals with criminal matters. The discovery proceedings in the Eastern District or, for that matter, the trial of the civil action in the Eastern District, do not threaten the jurisdiction of the Southern District to hear and determine every aspect of the criminal case, nor do they frustrate any outstanding order issued by the Southern District. Ironically, it is the Eastern District's jurisdiction which is being threatened by the Southern District's order and if § 1651 relief is appropriate at all in this instance it is appropriate to the Eastern District Court to protect its legitimate jurisdiction.

In *Haynes* v. *Hegnes, supra,* the court relied on *Peck* v. *Jenness*, 7 How. 612, 12 L. Ed. 841 (1849) and dramatically pointed out the enormous danger inherent in what Judge Bryan has done here:

> "It is a doctrine of law, too long established to require a citation of authorities, that, where a court has

jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court, and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.'"

c. Supervisory Powers Over the Administration of Criminal Justice

Perhaps the most significant and far-reaching aspect of Judge Bryan's decision is his concept of his supervisory power over the administration of criminal justice. He has cited no case, and indeed, none could be found, where this supervisory power has been given such limitless scope. If his concepts of power are accepted by this Court, the Federal District Courts will be plunged into the executive business of investigating crime. They will be plagued by conduct alleged to be "unfair" and asked to give advisory opinions relating to items of evidence and of conduct. Certainly, Rule 2 of the Federal Rules of Criminal Procedure which is to be construed to secure fairness in the administration of those rules does not support such a concept. Nor do the cases upon which he relies.

Rea v. *United States*, 350 U.S. 214, 76 S.Ct. 292 (1956);

McNabb v. *United States*, 318 U.S. 332, 63 S.Ct. 608 (1943);
Go-Bart Importing Co. v. *United States*, 282 U.S. 344, 51 S.Ct. 153 (1931);
In re No. 32 East Sixty-Seventh Street, 96 F.2d 153 (2 Cir. 1938);
Wise v. *Henkel*, 220 U.S. 556, 31 S.Ct. 599 (1911).

In *McNabb, supra*, the issue was whether or not an item of evidence, namely, a confession, should have been admitted in a federal criminal prosecution. A federal agent violated a specific federal rule of criminal procedure, namely, Rule 5(a), by failing to arraign the prisoner within a reasonable time. The federal agent was charged with the responsibility of upholding the law and his conduct was bound by that specific rule of criminal procedure. The court ruled, with its now famous logic, that neither the agent nor the government could profit by its own wrong, and, as a disciplinary measure, held the confession to be inadmissible. Similarly, in *Rea, supra*, a federal agent, sworn to obey the Constitution, violated the defendant's constitutional rights by an illegal search and seizure. The evidence was suppressed in a federal proceeding and the agent, quite callously, was prepared to turn over the illegally seized evidence for state court prosecution. At that time, of course, illegally-seized evidence was admissible in state court prosecutions. The court enjoined the agent, largely as a disciplinary measure, and under the reasoning of *McNabb, supra*, held it was unconscionable conduct on the part of the government agent.

Go-Bart, supra, is not at all applicable. It is no different from a motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure and emphasizes only the procedures employed prior to the adoption of Rule 41(e).

In *Wise, supra,* the United States Attorney, a party to the action, refused to obey a valid subsisting order of the Federal Court and was committed for it.

In the instant case, the Trustee's actions are not governmental actions, nor are they illicit in that they violate any Federal Rule of Criminal Procedure, or (like the agent in *Rea, supra*), the Constitution of the United States. A Federal judge, sitting in the criminal motion part of another court, has no disciplinary powers over a civil litigant who is performing his duties honorably and reasonably. No one can deny that the Trustee's discovery procedures are a legitimate and honest exercise of his rights and the depositions are, in the Trustee's hands, proper in every respect. There is, therefore, no cause or reason for Judge Bryan to originate and use a vast power to discipline a civil litigant whose behavior is beyond reproach.

CONCLUSION

The injunction below was issued without proper basis and in the face of adequate alternative remedies. The taking of the defendants' depositions in the civil case is fair in the circumstances. The Court of Appeals reversal to Judge Bryan's injunction which interfered with a matter exclusively within the jurisdiction of the Eastern District should be affirmed.

Respectfully submitted,

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